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GENERAL SERVICES ADMINISTRATION

41 CFR Part 102-39

[FMR Change 2011-02; FMR Case 2011-102-3; Docket No. 2011-0019, Sequence 1]

RIN 3090-AJ20

**Federal Management Regulation; Prohibited List for
Exchange/Sale of Personal Property**

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the Federal Management Regulation (FMR) by making changes to its policy on the replacement of personal property pursuant to the exchange/sale authority.

DATES: This final rule is effective on **[Insert date of publication in the Federal Register.]**

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC, 20417, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Robert Holcombe, Office of Governmentwide Policy, Office of Travel, Transportation, and Asset Management (MT), (202) 501-3828 or e-mail at robert.holcombe@gsa.gov. Please cite FMR Change 2011-02, FMR Case 2011-102-3.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the Federal Register on June 26, 2009 (74 FR 30493). Three changes were proposed.

Two of the proposed changes, regarding the handling of scrap property and an administrative change, did not elicit any significant objections during the public review period and were incorporated into a final rule published in the Federal Register on May 6, 2010 (75 FR 24820).

The most significant change was the proposal to remove the exchange/sale prohibition on aircraft and airframe structural components subject to certain conditions. GSA received eleven comments on that proposal. Due to the interest in this proposal, GSA took this intervening time to carefully review and consider these comments and objections. Public comments may be found at www.regulations.gov and searching for the applicable docket: GSA-FMR-2009-0002.

After careful review and consideration, GSA is choosing to codify the removal of the exchange/sale prohibition on aircraft and airframe structural components. In short, GSA has determined that removing the prohibition is in the best interest of the Government and will reduce

agencies' costs of managing their aircraft fleets. GSA understands the intent of the property management legislation at 40 U.S.C. 501 et seq. to require that property-holding agencies make full use of property already acquired in support of their mission. The exchange/sale authority, codified at 40 U.S.C. 503, supports that intent by allowing agencies to make use of their investment in these valuable assets and does not provide any commodity restrictions to this authority.

The rationale for removing aircraft from the prohibited list was provided in the "Background" section of the proposed rule is still considered valid and relevant. This rationale is reprinted below:

This proposed rule would remove the exchange/sale prohibition on aircraft and airframe structural components, subject to certain conditions. These commodities have been included on the list of properties normally ineligible for exchange/sale so that the acquisition and disposal of these commodities could be managed more closely. To conduct an exchange/sale of such commodities (which is encouraged to reduce the agency costs of managing their aircraft fleets), agencies have been required to submit deviation requests for approval by GSA. Adequate tools are now available for managing these assets without going through the time consuming and onerous deviation process. Further, removing these commodities from the "prohibited list" should not have a detrimental impact on the donation of such property. Finally, although agencies would no longer need to request deviations from GSA, a provision would be added to alert agencies that they must comply with the restrictions and limitations on the disposal of aircraft and aircraft parts contained in 41 CFR part 102-33.

Thus, for these reasons, this final rule revises the regulation to remove aircraft and aircraft structural components from the exchange/sale prohibited list as long as such transactions are conducted in accordance with provisions found at FMR part 102-33 (41 CFR part 102-33). Some specific comments received in response to the proposed rule, and GSA's response to those comments, are provided below:

Comment: The proposed changes are unnecessary, unwise, and would constitute an evasion of congressional appropriation authority.

GSA Response: The proposed changes have been requested by the Federal property managers and aviation managers as a way to better manage aviation assets. As the Federal officials responsible for safely maintaining our Federal aviation assets in a state of readiness, GSA disagrees with the characterization that these changes are "unnecessary" and "unwise." Also, GSA notes that Congress has specifically authorized the exchange/sale program under Title 40 U.S.C. § 503. Therefore, this FMR change does not introduce the ability to conduct an exchange/sale transaction, nor evade Congressional authority; it furthers an agency's ability to conduct an exchange/sale transaction as provided by law.

Comment: Furthermore, if enacted, this proposed change would further diminish the amount of personal property available to the State Agencies to place in public use. (10 similar comments).

GSA Response: As discussed in other documents and in discussions with our stakeholders, GSA has never denied a deviation request for the exchange/sale of these types of assets. These aviation assets were maintained on the prohibited list simply so that GSA could better manage these assets in compliance with GSA responsibilities under OMB Circular A-126, Section 13c. In addition, FMR §102-37.40 requires that property provided to donation recipients be Federal surplus. Conversely, FMR §102-39.65(b) states that property available for exchange/sale cannot be excess or surplus. Thus, this proposed change cannot diminish the amount of personal property available for donation to State Agencies, because the change only applies to personal property that was not eligible for donation in the first place.

Comment: Generally characterized as 'This rule change will hurt Federal civilian agencies who are not exchange/selling aviation assets because they will not be able to obtain excess aviation assets from other Federal agencies because of the notional rush by the holding agency

to exchange/sell all possible assets to satisfy its aviation requirements.' (3 comments).

GSA Response: Federal agencies are tasked to maintain their aviation assets to meet their agency missions, often with insufficient funds to meet all requirements. In order to meet their programmatic needs, they are encouraged to seek any funding solution, including the exchange/sale authority authorized under law.

Comment: generally characterized as 'The exchange/sale program only returns "pennies on the dollar" to the agency, whereas disposing of the asset through other methods provides a greater benefit to other agencies or donees.' (3 comments).

GSA Response: It is in agencies' best interests to maximize their available funds by obtaining the best return on their personal property investments. Therefore, there is little support for the comment that agencies would intentionally fund their aviation requirements by selling their aviation assets for anything less than the best price.

Also, GSA notes that the exchange/sale regulation at FMR § 102-39.55 allows agencies to offer personal property through either a reimbursable transfer with another agency, or through a negotiated sale with a State Agencies for

Surplus Property (SASP). GSA is not aware of any such request by an agency or SASP offering to pay below-fair-market value to obtain aviation property. If the holding agency were truly selling items at just pennies on the dollar, then we would expect other Federal agencies and SASPs to be eager to obtain such assets at bargain prices. However, GSA has never observed such a transaction, leading to the conclusion that agencies are not willing to sell aircraft for minimal, below-fair-market value prices.

Comment: generally characterized as "the exchange/sale authorities should be subordinate to the donation authorities." (2 comments)

GSA Response: GSA recognizes the vast benefits provided to the nation by the utilization and donation programs. At the same time, GSA also recognizes that under the expressed direction of Congress contained in 40 U.S.C. § 503, the authority to conduct exchange/sale transactions is granted directly to Federal agencies (40 U.S.C. § 503(a)). On the other hand the donation program authority is granted exclusively to GSA, with such transfers being made at GSA's discretion (40 U.S.C. § 549(b)). GSA therefore rejects the argument that its discretionary authority takes precedence over statutory authority granted to all other agencies. GSA also reiterates the argument

that donation authority applies only to surplus property, whereas exchange/sale authority applies to non-surplus property, rendering moot any discussion of subordinate and superior authorities.

Finally, there is the issue of fire control systems and guided missiles. Over the past several years, GSA has worked with Department of Defense (DOD) agencies on deviations to allow the exchange/sale of fire control systems (FSC Group 12) and guided missiles (FSC Group 14). These assets are also on the prohibited list at FMR §102-39.60(a). GSA observes that the "Note" to this section removes the requirement for deviations from the prohibited list for DOD transactions of these FSC Groups when otherwise meeting DOD and Federal laws and regulations. Because other, more stringent DOD and Federal laws are in place to prevent the inappropriate use of these assets outside their intended use, GSA sees no value in keeping these on the exchange/sale prohibited list. For these reasons, and since there would be no other legitimate, competing interests in obtaining this property outside the realm in which DOD operates, GSA does not see a need to obtain public comment on this matter through the publication of a proposed rule.

B. Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. § 804.

C. Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq., because the revisions are not considered substantive. This final rule is also exempt from the Regulatory Flexibility Act per 5 U.S.C. § 553 (a)(2) because it applies to agency management or personnel. However, this final rule is being published to provide transparency in the promulgation of Federal policies.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FMR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 102-39

Government property management and Personal property.

Dated: August 7, 2011

/s/

Martha Johnson

Administrator of General Services

For the reasons set forth in the preamble, GSA amends
41 CFR part 102-39 as set forth below:

**PART 102-39—REPLACEMENT OF PERSONAL PROPERTY PURSUANT TO
THE EXCHANGE/SALE AUTHORITY**

1. The authority citation for 41 CFR part 102-39
continues to read as follows:

Authority: 40 U.S.C. 121(c); 40 U.S.C. 503.

2. Amend § 102-39.60—

a. In paragraph (a) by removing the third entry "12
Fire control equipment", the fourth entry "14 Guided
missiles"; and, the fifth entry "15 Aircraft and airframe
structural components (except FSC Class 1560 Airframe
Structural Components)";

b. In paragraph (l) by removing "584" and adding "548"
in its place; and

c. By adding paragraph (m) to read as follows:

**§102-39.60 What restrictions and prohibitions apply to the
exchange/sale of personal property?**

* * * * *

(m) Aircraft and aircraft parts, unless there is full
compliance with all exchange/sale provisions in part 102-33
of this chapter (41 CFR part 102-33).

[Billing Code 6820-14]

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